sibility of the government for mob violence; and claims against the government. On many of these topics Mr. Devlin has not, of course, been the first in the field. Mr. C. H. Butler in "The Treaty-Making Power of the United States" has dealt adequately, in 1902, with the history and judicial decisions affecting the treaty-making power in this country; Professor J. B. Moore has covered thoroughly the subjects of extradition and of diplomatic relations in his "Treatise on Extradition and Interstate Rendition," and "Digest of International Law."

The present work, however, is the first volume on this branch of our law which has been published since the recent controversy between the United States and Japan in regard to the right of the Japanese children to attend in San Francisco the public schools to which children of resident citizens of other countries were admitted. This controversy presented two questions: first, the preliminary one whether the right to attend the public schools was a right of residence within the meaning of the treaty and whether there was a deprivation of that right in the segregation of Japanese by the school board; and, second, if this right were established in favor of the contention of the Japanese, did the United States have the legal power to make a treaty which should be superior to the laws of a state? Mr. Devlin gives at length the opinion of the Department of State in support of the superiority of the treaty, and summaries of and quotations from the contemporary expert comment, which, apart from the debates in Congress, generally sustains the same view. Not long ago, we have indicated that the treaty-making power, though in some repects limited, would probably extend to this subject; but we have also suggested that, granting that "rights of residence" included educational privileges, no rights of the Japanese were violated in this case, inasmuch as not only "native citizens" but "citizens of the most favored nation" are constitutionally subject, where appropriate legislation exists, to segregation in schools provided they receive treatment equal to that of pupils elsewhere. 20 HARV. L. REV. 337–339.

The chief merits of the present work must be found in the presentation of the aspects of the main subject which have developed since Mr. Butler's work in 1902; in a somewhat fuller consideration of the topic of construction of treaties than has yet been made; and, generally, in the benefit to the profession through a new development by a qualified and agreeable writer of subjects which have been already skillfully dealt with by other authors. J. W.

WATER RIGHTS IN THE WESTERN STATES. By Samuel C. Wiel. Second Edition, Revised. San Francisco: Bancroft-Whitney and Company 1908. pp. lxix, 974, 800.

Mr. Wiel's book brings down to a recent date the work of Pomeroy as applied to the Western States, with especial reference to the doctrine of appropriation, a subject which occupies more than half the volume.

Little has been added to the doctrine of riparian right as developed in California, though slight changes in its relations to other sources of title are brought out by late decisions.

The law of appropriation chiefly treated in this book has received its legal sanction in comparatively modern times, though the attempts to gain rights by mere priority of occupation have no doubt been among the earliest of human endeavors. There is some confusion in the use of the word "appropriation." This confusion occurs in statutes and decisions. The Constitution of California, Art. XIV, § 1, declares that "the use of all water now appropriated, or that may hereafter be appropriated for sale, rental, or distribution, is hereby declared to be a public use." The word "appropriated" here means "applied," or "devoted," and does not connote any method of acquisition. Merrill *v.* Southside Irr. Co., 112 Cal. 426. In Katz *v.* Walkinshaw, 141 Cal. 116, and Burr *v.* Maclay Rancho, Oct. 16, 1908, 36 Cal. Dec. 315, the users of underground water, in the one case coming from artesian wells and in the other case pumped from an underground basin, are spoken of as "appropriators for use on distant lands," though this cannot strictly refer to statute rights, acquired by

priority, to waters "flowing in a river or stream or down a canon or ravine" (Cal. Civ. Code, § 1410), widely as those words have been stretched, and the doctrine of the above cases, though analogous in some of its results to appropriative as against riparian users, is not based on the statute, the court expressly declaring in the Katz case, p. 135, "There is no statute on this subject, as there now is concerning appropriations of surface streams." It is to be regretted that the author does not make more clear the exact meaning of "appropriations."

The illogical character of the principle formerly held, that valid appropriation must be made on public land (Cave *v.* Tyler, 133 Cal. 566), is well shown by Mr. Wiel, but although he notes, he fails to comment on, the view taken in a late case (Duckworth *v.* Watsonville, 150 Cal. 520), that "the right to appropriate water under the provisions of the Civil Code is not confined to streams running over public lands, the court using the expression "common law appropriation." This loses sight of the California theory of the historic basis (referred to in the opinion) of appropriation as an implied grant from the United States (Act of 1866, Rev. St. U. S. §§ 2339, 2340), and from the state by the provisions of the Code. The view is squarely opposed to all the California authorities which have passed upon this point. The qualifications, however, contained in the opinion practically confine appropriators of the class indicated to rights ripened by prescriptive user.

Mr. Wiel says that water in an artificial watercourse is personalty. This statement is certainly too broad, if not erroneous. It was contended in the case of Stanislaus Water Co. *v.* Bachman, 93 Pac. 858, that the water right only was realty; the water personalty. The decision in that case holds, "The right to have water flow from a river into a ditch is real property; and so also is the water while flowing in the ditch." This case is supported at least by Standart *v.* Round Valley, 77 Cal. 400, and Fudickar *v.* East Riverside, 109 Cal. 36, whereas the "recent case," Hesperia *v.* Gardiner, 4 Cal. App. 357, relied upon by Mr. Wiel, only actually decided that a water company could sue for water furnished to a customer from its pipes as personalty, a principle admitted by all.

The point is not wholly academic. The question of jurisdiction in suits to quiet title and of the effect of the recording acts may be involved and it is probable that water flowing in a ditch will be considered real estate for these purposes.

While the general conclusions of the author are clear and usually sound, some errors of detail have crept into the work. For instance, several cases where prescriptive right only is involved are cited to show that appropriation may be made on private land. Hildreth *v.* Montecito is cited to show that where persons separately entitled to water form a corporation to distribute it, the use is public. This was the Commissioners' decision, approved in department, reversed and decided to the contrary by the court in bank, Hildreth *v.* Montecito, 139 Cal. 22. Notwithstanding a few such defects, the work is one of great erudition and substantial value. G. H. G.

THE PUBLICATIONS OF THE SELDEN SOCIETY. Volume XXIII. For the year 1908. Select Cases Concerning the Law Merchant. A. D. 1270–1638. Volume I. Edited for the Selden Society by Charles Gross. London: Bernard Quaritch. 1908. pp. cv, 181. 4to.

This volume contains cases from fair, staple, and tolsey courts, the local courts whose main business was the administration of the law merchant. Fourteen of these courts are represented, but five-sevenths of the cases are from the Court of St. Ives. Especial attention is given to this court in the introduction, which deals with the origin, development, and decline of the fair courts. The discussion of the law merchant itself the editor reserves for the second volume, to be made up in the main of cases taken from the King's Bench, Common Bench, and Exchequer.

There is much interesting material in the first volume. We find several illustrations of legal principles which were recognized in the royal courts only